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SUPREME COURT, U.S.
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No. 87-2100
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

-and-

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

RESPONDENT CITY OF NEW YORK'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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August 22, 1988

COUNTER-QUESTIONS PRESENTED

1. Whether there is a final appealable state court judgment giving this Court jurisdiction under 28 U.S.C. §1257?

2. Whether petitioner is a prevailing party entitled to attorneys' fees and costs under 42 U.S.C. §1988 since she failed to state and prove a cause of action for deprivation of her right to just compensation pursuant to 42 U.S.C. §1983 where the New York Cable Television statutory scheme was upheld as constitutionally valid, and petitioner has not sought nor been denied just compensation, and her other claims, sounding primarily in trespass, were substantially rejected?

3. Assuming, arguendo, that petitioner is a prevailing party under 42 U.S.C. §1988, whether attorneys' fees may be awarded against intervenor-defendant City of New York under Kentucky v.

Graham, 473 U.S. 159 (1985), where the City has no substantive liability on the merits?

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JEAN LORETTO, on behalf of herself and all others similarly situated,

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RESPONDENT CITY OF NEW YORK'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

STATEMENT OF THE CASE

The instant case concerns the efforts of plaintiff-petitioner Jean Loretto ("petitioner") to recover attorneys' fees in an action, sounding in trespass and unsuccessfully

challenging the constitutionality of New York Executive Law, section 828, which authorizes installation of cable television equipment on a landlord's premises and provides compensation therefore, following a judgment dismissing her complaint.

Petitioner now seeks to have this Court review by writ of certiorari orders of the New York State Supreme Court, Appellate Division, First Department, entered February 10, 1987 and December 15, 1987 respectively, which affirmed an order and judgment of the New York Supreme Court, New York County, entered June 25, 1985, denying petitioners' application for some $500,000 in attorneys' fees and costs. The Appellate Division held that petitioner, who has never sought nor been denied just compensation for the minimal taking of her property, was not a "prevailing party" pursuant to 42 U.S.C. §1988, where, inter alia, she failed to "allege

sufficiently, much less prove" any federal constitutional violation (A11-A12).[1]

a) Loretto Litigation History[2]

In January 1976, petitioner, the owner of a Manhattan apartment building, commenced this alleged class action in New York Supreme Court seeking over $1,000,000 in damages for alleged trespass by defendants Teleprompter Manhattan CATV Corp. and Teleprompter Corporation (hereafter "Teleprompter" or "Group W").[3]

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[1]Unless otherwise stated, numbers in parentheses refer to pages in the Petitioner's Appendix.

[2]In the interest of judicial economy, we will rely on the statutory background portion of co-respondent-appellee Group W's Brief in Opposition to Certiorari.

[3]Although nominally brought as a class action, no notice was ever given, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, n.4 (1983). Although that notice was postponed by stipulation, id. n.4, that stipulation was only pending disposition of

(Footnote Continued)

The complaint alleged numerous causes of action for trespass by Teleprompter's unlawful installation of cable television ("CATV") components on her property (¶6-23). It also alleged that such installation, pursuant to New York Executive Law, section 828(1)(b),[4] and the corresponding administrative regulations, 9 N.Y.C.R.R. Part 598, constituted a

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(Footnote Continued)
the parties' motions for summary judgment on the underlying action. Petitioner has now recognized that only individual applications may be made for compensation (Pet., p. 16).

[4]Executive Law, section 828(1)(b) provides:

> No landlord shall . . .
>
> b. demand, or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable.

deprivation of property without due process, and, additionally, a taking of property without just compensation (¶25-26).

In her prayer for relief, plaintiff sought: (1) a damages award of $1,000,000 for trespass, including actual damages, and the alleged value of the property rights to Teleprompter, and its "mense profits," i.e., 5% of revenues derived, and (2) to enjoin defendants from placing CATV components on any real property without the owner's written consent. Teleprompter's amended answer raised numerous affirmative defenses, including plaintiff's failure to seek the reasonable compensation available under the Executive Law from the State Commission on Cable Television ("CATV Commission").

Thereafter, in 1977, the City of New York's motion to intervene as a defendant in order to protect the public interest in its role as municipal franchisor under Executive

Law, section 819, was granted. The City sought to ensure the continued growth of cable television service, and to avoid the imposition of extraordinary charges on cable companies, which costs would ultimately be borne by subscribers and result in a decrease in subscriptions. It also sought to prevent landowners from arbitrarily denying tenants access to cable service.

In its answer, the City denied the numerous allegations of trespass, and that there was an unconstitutional taking without just compensation. It pled several affirmative defenses, including that the placement of cable television components on plaintiff's property was authorized by Executive Law, section 828, and that plaintiff had failed to seek compensation from the CATV Commission under Executive Law, §828(1)(b).

Following separate motions for summary judgment dismissing the complaint, by order entered March 14, 1979, the Supreme Court, New York County, granted summary judgment to defendants on the basis of their threshold argument that the Executive Law, section 828, was a valid exercise of the State's police power. Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc. 2d 944, 415 N.Y.S.2d 180 (Sup. Ct., N.Y. Co., 1979). Having made that finding, the Court did not address the defendants' alternative argument that the statute, Executive Law, §828(b)(1), already provided for just compensation, since it provided for payment of a reasonable fee. The Appellate Division, First Department, affirmed, without opinion. Loretto v. Teleprompter Manhattan CATV Corp., 73 A.D.2d 849, 422 N.Y.S.2d 550 (1st Dept., 1979).

Following the State of New York's intervention, the New York Court of Appeals affirmed that order. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981). It addressed only the threshold argument, holding that Executive Law, section 828, was a valid exercise of the police power rather than a taking requiring just compensation. Notwithstanding, it acknowledged that the statute, in any event, provided for reasonable compensation as determined by the CATV Commission. Id. at 130-131, 142.[5]

On appeal, this Court unanimously upheld the validity of section 828 of the

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[5]The Court acknowledged that the Legislature had determined that landlords should be permitted compensation as determined reasonable by the CATV Commission, see Exec. Law, §828(1)(b), but in dicta only, expressed its view that the Legislature could have permitted that no payment need be made. Id. at 142.

Executive Law as a proper exercise of the police power. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982). Nonetheless, in a 6-3 opinion, this Court rendered a "very narrow" holding affirming the "traditional rule" that "[the] minor but permanent physical occupation" constituted a taking for which just compensation was due. Id. at 421, 441.

Based on that "very narrow" ruling, this Court reversed and remanded to the New York Court of Appeals to consider the amount of compensation due. Id. at 441. It did not rule on the issue of whether state law already provided a method for just compensation, and noted that the Court of Appeals had not yet determined whether the nominal fee ordinarily awarded was adequate compensation. Id. at 425. This Court expressed no opinion on the amount due, but rejected any assumption that the high fees

exacted prior to the law's enactment would be proper. Id. at 441. In the dissenting opinion, Justice Blackmun stressed that "[h]appily, the Court leaves open the question whether §828 provides landlords like appellant sufficient compensation for their actual losses..." Id. at 456, n.12.

On remand, rejecting petitioners' separation of powers argument, the New York Court of Appeals unanimously held that section 828 of the Executive Law is constitutionally valid because it provides a method for determining reasonable, i.e., just compensation for both crossover and noncrossover situations. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 147-154, 459 N.Y.S.2d 743, 746-749 (1983). It thus adopted the alternative argument made by the defendants City et al. throughout these proceedings. It found that the CATV Commission could

properly determine, by regulation and administrative hearing, the amount of compensation due, but the lower Court was to retain jurisdiction for the purpose of reviewing any award of just compensation in the instant case. Id. at 149-150; see Exec. Law, §§816(3)(5), 828(1)(b); 9 N.Y.C.R.R. 598.1--598.7.

In addition, the Court of Appeals expressly rejected the bulk of plaintiff's other arguments on remand. Id. at 147-155. This included her persistent arguments of trespass, id. at 143, except to the extent, petitioner, "if so advised", decided to proceed with a trespass action against Group W for the ten-month period prior to the statute's effective date. Id. at 147-149. The Court also rejected her extended arguments that the New York Eminent Domain Procedure Law superseded the Executive Law, id. at 150-151, as well as various other

meritless alleged constitutional flaws, id. at 152-154.

The Court of Appeals did invalidate a single one of the Commission's regulations, 9 N.Y.C.R.R. §598.3, which had required that an owner's application for compensation be made within 60 days after October 30, 1973, or the date of installation, whichever was later. Id. at 154. Because section 598.3 could be construed as barring a landlord's claims prior to the receipt of notice of the right to just compensation, the Court found it alone invalid, without disturbing the constitutionality of the statute. Id.

In so doing, the Court stressed that plaintiff never raised the notice issue until the case reached the Court of Appeals on remand. Id. The Court found that the notice issue was not properly before it, and "... appears from the stipulated facts no longer to present a problem," because both

Teleprompter and the Commission had immediately agreed to waive and repeal that regulation Id. Following this Court of Appeals' decision almost uniformly rejecting all of plaintiff's claims on remand, petitioner's motion for reargument was denied, by order entered April 28, 1983. Loretto v. Teleprompter Manhattan CATV Corp., 59 N.Y.2d 761, 463 N.Y.S.2d 1030 (1983).

Thereafter, by Order and Judgment on Remittitur dated July 11, 1983, the Supreme Court affirmed Special Term's earlier 1979 judgment dismissing petitioner's complaint. It modified the order solely by: (i) declaring Regulation 598.3 to be invalid, (ii) permitting petitioner to apply to the Commission for payment of "just compensation," and (iii) permitting petitioner to proceed with her individual action in trespass against Group W, "if she be so

advised," for the period prior to the enactment of Section 828. Petitioner has taken no steps in furtherance of any of these claims.

In particular, she never submitted an application to the CATV Commission, and thus never received a determination of compensation due her. Similarly, she never pursued a trespass action against Group W for the 10-month period prior to the law's enactment. Further, at the time of her application, no other property owners had submitted applications for compensation to the Commission and had not done so through late 1987 (see A8).

b) The Attorneys' Fee Proceedings and Opinions Below

Instead of pursuing the above actions, a year and half later, in December 1984, plaintiff moved in Supreme Court, New York County, for attorneys' fees and costs,

alleging entitlement under 42 U.S.C. section 1988 and under N.Y. Civil Practice Law and Rules ("CPLR"), section 909, allowing fees in state class actions. She sought a total of $503,590.00 against Group W, successor to defendant Teleprompter, $454,677.00 against the City of New York, and $270,136.50 against the State of New York; she sought joint and several liability, and apportioned such fees based solely on the time of entry into the lawsuit. Defendant City and Group W Cable argued that petitioner was not entitled to fees on various grounds, and the State defaulted on the motion.

By order, and underlying opinion, entered June 25, 1985, the Supreme Court, New York County, denied the motion "as premature with leave to renew at the appropriate time" (A24-A43). Rejecting defendants' arguments, the Court found that petitioner was a "prevailing party" within

§1988 (A37-A38). Notwithstanding, it found that it was unable to assess the true impact of petitioner's and her counsel's efforts, until she proceeded to the CATV Commission for her "just compensation" (A42).[6] In December 1985, the Supreme Court, New York County, denied the reargument motions by petitioner and Group W (A45-A48).

By order entered February 10, 1987, the Appellate Division, First Department, affirmed without opinion, the lower Court's June 1985 order denying the attorneys' fees application (A21). Loretto v. Group W Cable, 127 A.D.2d 475, 511 N.Y.S.2d 542 (1st Dept., 1987). Upon cross-motions, by

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[6]The Court rejected the City's alternative argument that the action should be dismissed as against it based on petitioner's failure to establish the City's liability, i.e., showing a municipal policy resulting in a civil rights deprivation (A39), and failed to address its arguments based on its extremely limited intervention role in the lawsuit.

order of December 15, 1987, the Appellate Division granted reargument and adhered to its prior affirmance for the reasons stated thereafter (A1-A17). Loretto v. Group W Cable, 135 A.D.2d 444, 522 N.Y.S.2d 543 (1st Dept. 1987).

Specifically, the Appellate Division held that the lower Court had correctly denied the motion, but had erroneously found petitioner to be a "prevailing party" (A3). Upon its own thorough review of the litigation history and applicable precedent (A2-A11), the Appellate Division held that the establishment of a taking alone was insufficient to establish petitioner's 42 U.S.C. §1983 claim (A10-A11). Rather, until petitioner applied for just compensation, utilizing the Executive Law statutory scheme, and was denied such compensation, she had failed to plead sufficiently, much less prove, the denial of

any federal constitutional right (A11-A13) (citing, inter alia, Gomez v. Toledo, 446 U.S. 635 (1980) and Williamson County Planning Commission v. Hamilton, 473 U.S. 172 (1985)) (see text of opinion, reproduced in Group W's Brief in Opposition to Certiorari).[7]

On March 24, 1987, the Court of Appeals denied petitioner's motion for leave to appeal the Appellate Division's orders (A84). Loretto v. Group W Cable, 71 N.Y.2d 802, 527 N.Y.S.2d 768 (1987).

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[7]The Appellate Division also rejected petitioner's claims to entitlement under state law, CPLR 909, allowing discretionary fees in class actions (A13-A17). Noting that no notice was ever given to the putative class, it found that alleged members thereof "are consigned to essentially the same procedures for obtaining compensation as ... existed ever since the enactment of Executive Law §828 [in 1972]" (A13).

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE ORDERS BELOW ARE NON-FINAL. IN ANY EVENT, THE COURT BELOW FOLLOWED WELL-SETTLED PRINCIPLES OF LAW ESTABLISHED BY THIS COURT IN DETERMINING THAT PETITIONER IS NOT A PREVAILING PARTY WITHIN THE MEANING OF 42 U.S.C. §1988, WHERE, INTER ALIA, SHE FAILED TO PLEAD AND PROVE A DENIAL OF JUST COMPENSATION UNDER 42 U.S.C. §1983.

MOREOVER, UNDER APPLICABLE PRECEDENT, PETITIONER MAY NOT RECOVER ATTORNEYS' FEES FROM THE CITY OF NEW YORK WHICH HAD NO SUBSTANTIVE LIABILITY ON THE MERITS.

Petitioner contends that this case merits review for three reasons (Pet., pp. 21-22). She argues first that there is a "chilling effect" upon resort to New York courts for vindication of constitutional rights and by an alleged "evading" of a directive of this Court (Pet., pp. 21, 23-26). Second, she argues that it offers a "vehicle" for more precise

definition of the concepts of a section 1983 cause of action and of "prevailing" under section 1988 (Pet. br., pp. 26-37). Thirdly, she claims it presents the issue of entitlement to interim awards in protracted litigation, "even if the success is deemed to be only at an interim stage" (Pet., pp. 22, 38-43).

As we will show below, these orders are not final. In addition to being non-final, the orders should not be reviewed because we submit that, under well-settled principles of law established by this Court, petitioner did not demonstrate that she met any of the prerequisites for a fee award under 42 U.S.C. §1988. Of major importance, as the Appellate Division correctly held, she has never proved a violation of any federal constitutional right under 42 U.S.C. §1983. The decision below is not in conflict with any decision of this Court. Further, there

is no compelling federal issue of wide-spread public importance. This case was essentially unsuccessfully prosecuted in trespass and unsuccessfully challenged the constitutionality of New York Executive Law, section 828, authorizing cable television equipment installation on a landlord's premises and providing compensation therefore.

While the petitioner obtained a "very narrow" holding that there was a taking based on what this Court termed the "traditional rule," 458 U.S. at 441, she has never utilized the available Executive Law, §828, statutory procedures for obtaining just compensation, essentially intact since 1972. Thus, she has never been denied just compensation. Instead, she waited almost two years after a judgment dismissing her complaint, but retaining jurisdiction to review any such award, to seek a huge

award of attorneys' fees. Thus, further review is unwarranted and the petition for a writ of certiorari should be denied.

(1)

As a threshold matter, the orders for which appeal is sought are non-final state court judgments, thereby depriving this Court of jurisdiction under 28 U.S.C. §1257(2). See, e.g., Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67-72 (1948); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-487 (1975). The Appellate Division opinion makes clear that petitioner may seek just compensation from the CATV Commission (" . . . [petitioner], who to date has not utilized the procedures to obtain compensation which have existed in substantially the form they do today since the enactment of Executive Law §828 in 1972, cannot now make a §1983 claim" (A12) (emphasis added)). Indeed, the Court of

Appeals' 1983 opinion instructed the lower Court to retain jurisdiction to review any eventual award. See Loretto v. Teleprompter Manhattan CATV Corp., supra, 58 N.Y.2d at 147, 459 N.Y.S.2d at 746 (see also A82 -- lower Court judgment retaining jurisdiction). Petitioner has not yet pursued these state administrative proceedings, and, further, she has never renounced her opportunity to do so. See, e.g., Department of Banking v. Pink, 317 U.S. 264, 268 (1942) (test of finality is " . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state Court").

Furthermore, in seeking review of the Appellate Division orders, petitioner sought leave to appeal to the New York Court of Appeals, rather than claiming an appeal as

of right on constitutional grounds. Compare New York CPLR 5602(a)(1)(i) with CPLR 5601(b). We believe it is understandable why she did not seek review as of right, since, as discussed below, there is no substantial constitutional question directly involved herein. In any event, however, even in seeking permission to appeal under CPLR 5602(a)(1)(i), there must be a "final" determination. Here, the Court of Appeals denied the motion (A84), but without indicating if it was for want of the jurisdictional statutory prerequisite "final" determination. Based on all the above, however, the orders are non-final and, accordingly this Court lacks jurisdiction. The petition should thus be denied. See Minnick v. California Department of Corrections, 452 U.S. 105, 122-127 (1980).

(2)

In any event, pursuant to 42 U.S.C. section 1988, in any action or proceeding to enforce a provision of section 1983, a court, "... in its discretion, may allow the prevailing party ..." reasonable attorneys' fees as part of the costs. 42 U.S.C. §§ 1983, 1988; see Maine v. Thiboutot, 448 U.S. 1 (1980). While such an award should ordinarily be granted "unless special circumstances would render such an award unjust," Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), a plaintiff must establish the two prerequisities: (1) that she stated a claim pursuant to section 1983, and (2) that she was a prevailing party.

In the instant case, petitioner failed on both counts. First, she never alleged and proved a constitutional violation since she has never sought nor been denied just

compensation. Williamson County Regional Planning Commission v. Hamilton, 473 U.S. 172, 194-195 n.13 (1985) ("... a property owner has not suffered a violation of the Just Compensation clause until [she] has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation"). As reviewed above, ante, pp. 3-14, and in Group W's Brief in Opposition to Certiorari, Executive Law, §828, provides an adequate means for seeking just compensation in the first instance from the State Commission on Cable Television, with judicial review thereof, as it has always done since its passage in 1972 by the New York State Legislature.

Moreover, petitioner is not a prevailing party within the meaning of 42 U.S.C. §1988. Hewitt v. Helms, ___ U.S. ___, 107 S.Ct. 2672, 2675 (1987), citing Hanrahan v.

Hampton, 446 U.S. 754, 757 (1980) (per curiam). See also Gingras v. Lloyd, 740 F.2d 210, 212 (2d Cir. 1984); New York City Unemployment and Welfare Council v. Brezenoff, 742 F.2d 718, 724 n.4 (2d Cir. 1982). The minimal results of this lawsuit, an interlocutory "very narrow" ruling that there was a "traditional" taking, and an invalidation of a minor CATV Commission regulation, never challenged in the underlying suit, does not constitute substantive relief on the merits, and clearly petitioner did not establish any liability on the merits on the part of defendants, particularly defendant City. Kentucky v. Graham, 473 U.S. 159 (1985).[8]

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[8]Petitioner's reliance on Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (a non-civil rights case) and Bradley v. Richmond School Board, 416 U.S. 696 (1974) (Pet., pp. 35-36) is misplaced, since she

(Footnote Continued)

Significantly, petitioner ignores this Court's own statement that it rendered a "very narrow" holding and used a "traditional" and "historical" test. Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at 435-439, 441 (see Pet., p. 11). Further, this Court firmly rejected petitioner's contention that Executive Law, §828, was an invalid exercise of the police power and thus unconstitutional. Accordingly, on this record, and for all the above reasons and those stated in Group W's Brief in Opposition, petitioner was not a prevailing party within the meaning of 42 U.S.C. §1988.

While petitioner now claims that she brought this suit only to obtain a determination of entitlement to just

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(Footnote Continued)
has never established any liability on the merits, as required in both.

compensation for the taking caused by installation of CATV components (Pet., p. 9), as detailed above, ante, pp. 4-5, she primarily sought a huge damages award based on the state law of trespass. Indeed, following this Court's decision, on remand in the Court of Appeals, petitioner argued that her action was exclusively in trespass despite this Court's decision that there was a "taking."[9]

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[9]For example, in her 145 page Main Brief on Remand ("Rem. br."):

> A. She opened her argument to the Court of Appeals with the statement that "This is a class action in trespass. . . ." (Rem. br., p. 1 (emphasis in original).
>
> B. Her first subheading, stated: "This Action Is Exclusively In Trespass. . . ." (Rem. br., p. 15).
>
> C. Plaintiff further asserted: "The Supreme Court's Decision That There Has Been a 'Taking'

(Footnote Continued)

In light of the above, this action was not brought to further the congressional policy of facilitating access to the judicial process for victims of civil rights violations who might not otherwise be able to afford it. Indeed, petitioner waited almost two years to even seek attorneys' fees and then submitted a legally insufficient application (see post, pp. 32-35).

(3)

Moreover, with respect to the City of New York, petitioner did not, and could not, state a claim under 42 U.S.C. §1983, i.e., she did not allege or establish that the City, through official custom or policy, acted to deprive her of a constitutional right. Monell v. Department of Social Services, 436 U.S.

(Footnote Continued)
. . . Has not Converted The Nature of this Action From Trespass" (Rem. br., p. 18).

658 (1978). Thus, following the City's intervention in the public interest, ante, pp. 5-6, petitioner never amended her complaint to state a cause of action against the City.

In any event, petitioner never established any substantive liability by the City on the merits, thereby precluding any fee award against it. Kentucky v. Graham, 473 U.S. 159 (1985), see also Young v. City of Killeen, Texas, 775 F.2d 1349, 1351, 1354 (5th Cir.), reh. denied, 778 F.2d 790 (5th Cir. 1985); Annunziato v. The Gan, Inc., 744 F.2d 244, 253 (2d Cir. 1984). Whereas the Court of Appeals on remand allowed the extremely limited relief, i.e., a possible trespass of action against Group W for a ten-month period and invalidating a minor one of the State CATV Commission regulations, nothing was directed as to the

City. Cf. Counsel v. Dow, 849 F.2d 731, 739-741 (2d Cir. 1988).[10]

Finally, even if, arguendo, there was no such bar to a fee award against the City, it should be denied because the "special circumstances" in this case, would render it unjust. Newman v. Piggie Park Enterprises, Inc., supra, 390 U.S. 402; see Northcross v. Memphis Board of Education, 412 U.S. 427 (1973). In particular, the City's extremely limited intervention role warranted

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[10]We note that, in seeking attorneys' fees herein, petitioner stated below, without equivocation, that the Teleprompter (Group W Cable) defendants were "the real parties in interest." In this Court, the State of New York expressly designated itself "... the true party in interest ... since the issue is the constitutionality of one of its statutes which has statewide application and is of vital public concern." Indeed, the Supreme Court, New York County, found that plaintiff's action was "... for all practical purposes aimed at the Executive Law and the State Commission on Cable Television and the conduct of the Attorney General" (A39).

a denial of fees against it. See, e.g., Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677, 684-85 (6th Cir. 1985) (en banc), cert. denied, 474 U.S. 1083 (1986) (intervenors not liable for statutory fees where "there is no evidence that the intervenors in any way interfered with the progress of the litigation");[11] Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, sub nom. Lutjeharms v. Rose, 474 U.S. 817 (1985) (where the state

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[11]Most tellingly, on remand in the Court of Appeals, the City submitted a single 2½ page brief. It succinctly argued (as it had throughout the action) that section 828(b) of the Executive Law provided for just compensation by requiring payment of a "reasonable" amount which could constitutionally be established by the State Cable Commission. This is precisely what the Court of Appeals held. In contrast, petitioner submitted a 145-page main brief, as well as very lengthy reply and sur-reply briefs. Group W submitted briefs over 100 pages long, while the State's two briefs numbered about 40 pages.

commissioner of education, the governor, and the local school board had been found liable for fees, the United States Court of Appeals for the Eighth Circuit modified the award by making the commissioner of education, who had been the central actor, the sole party liable for fees; the local school board was merely doing what it had been told to do by the commissioner, and the governor had absolutely no involvement in the disputed acts).

(4)

A final reason for denying the writ is that, even if, arguendo, petitioner was a prevailing party for the purposes of a fee award, her fee application was legally insufficient thereby barring an award. See, e.g., Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). After petitioner waited an unreasonable and prejudicial 17 months after the July 1983

dismissal order on remittitur to make this application (see, e.g., Baird v. Bellotti, 724 F.2d 1032 (1st Cir.), cert. denied, 467 U.S. 1227 (1984)), even then she failed to provide the court with contemporaneous time records to allow a determination of whether the hours claimed were reasonably and productively spent. Hensley v. Eckerhart, 461 U.S. at 437. After defendants City et al. opposed her application on that basis, the two firms submitted some minimal documentation, but without any breakdown as to the separate trespass and other claims litigated nor an adequate description of the work performed.

Thus, in seeking compensation for some 3000 hours, the "joint application" on behalf of two firms, petitioner's lead counsel, representing her here, claimed 2000 hours, while its "of counsel" firm claimed 1000 hours. There was no explanation of the separate functioning of the two firms nor a

breakdown of the work by separate successful and unsuccessful claims. Id. at 437; Copeland v. Marshall, 641 F.2d 880, 891-892 (D.C. Cir. 1980) (en banc) (duplication found where attorneys unreasonably doing same work, as in this case).

Indeed, the two supporting affirmations reflected almost totally similar work after 1977, including the preparation and drafting of briefs. For instance, for the work done in the Court of Appeals on remand, the lead counsel seeks payment for about 300 hours (6 50-hour weeks), while the "of counsel" firm seeks payment for about 450 hours (9 50-hour weeks). Clearly, they did not prove by clear and convincing evidence that 750 hours or 4 months work was not duplicative and excessive, where the New York Court of Appeals rejected nearly all of

petitioner's continued claims of trespass, statutory and constitutional flaws.[12]

(5)

Based on all the above, and the very narrowness of this case, petitioner's "chilling effect" arguments lack substance. Furthermore, petitioner does not, and

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[12]Other insufficiencies included a failure to give any professional background for many individual lawyers nor paralegal qualifications, and improperly seeking paralegal fees based on hourly rates charged, rather than as expenses based on wages paid. See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 473 (2d Cir., 1974). Moreover, petitioner improperly calculated the fees using her then current hourly rates, rather than the historic rates used in multi-year cases. New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1153 (2d Cir. 1983). Nor was she entitled to her requested 15% multiplier, Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air., ___ U.S. ___, 107 S.Ct. 3078, 3086 (1987); Blum v. Stenson, 465 U.S. at 898-899, nor her request for fees and expenses with respect to the fee application (which she had not sought below). New York Association for Retarded Children v. Carey, 711 F.2d at 1148.

cannot, substantiate her claim that in some unspecified manner the Court of Appeals on remand "evaded" this Court's directive (Pet., p. 22), and, obviously, she never sought review by this Court.

So too, the narrowness of this case presents no opportunity for this Court to define further the concepts of a §1983 cause of action and a §1988 "prevailing party". Indeed, this Court has given recent and ample guidance in the area. See, e.g., North Carolina Dept. of Transportation v. Crest Street Community Council, 479 U.S. 6, 107 S.Ct. 336 (1987); Hewitt v. Helms, ____ U.S. ____, 107 S.Ct. 2672 (1987); Kentucky v. Graham, 473 U.S. 159 (1985); Williamson County Regional Planning Commission v. Hamilton, 473 U.S. 172 (1985). Similarly, this case presents no opportunity for this Court to examine the efficacy of interim fee awards where, so far, petitioner has in

essence obtained only interlocutory rulings which may effect a disposition on the merits. Hanrahan v. Hampton, supra, 446 U.S. at 759. Further, while this Court has rejected a rule of strict proportionality of a fee award based on the amount of damages a civil rights plaintiff actually recovers, City of Riverside v. Rivera, 477 U.S. 561, ___, 106 S.Ct. 2686, 2694 (1986), it nevertheless held that the amount of damages is a "certainly relevant" consideration to the amount of fees awarded. Id. at 2694.

In conclusion, petitioner has failed to demonstrate that she is a "prevailing party" within the meaning of 42 U.S.C. §1988, because, inter alia, she has never proved any violation of her constitutional rights. This Court upheld the Executive Law, section 828, cable television statutory scheme as constitutional, Loretto v. Teleprompter Manhattan CATV Corp., 419 U.S. at 425,

and, as recognized by the Appellate Division, the procedures for obtaining just compensation are essentially the same ones that have existed since the statute's enactment in 1972 (A13). The narrowness of this case is clear, since it was brought primarily as a trespass action, and prosecuted as such after this Court's decision on remand (see, e.g., Petitioner's Br. on Remand in Court of Appeals, p. 18, stating "The Supreme Court's Decision that there has been a 'Taking' ... Has not Converted the Nature of this Action From Trespass"). In light of all the above, therefore, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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